THE FUTURE OF DEMOCRACY

WHY SHOULDN’T PRISONERS BE VOTERS?

Americans take for granted that they have a right to vote. The situation of people in prison suggests otherwise.

By Daniel A. Gross

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Illustration by Paul Sahre

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Foster Bates lives in G-Pod, a medium-security unit of Maine State Prison, a cluster of concrete buildings that sits an hour and a half northeast of Portland in the woods of a town called Warren. G-Pod contains two tiers of locking cells, a weight machine, a few potted plants, some tables, and many hard plastic chairs. There, before each election, Bates receives an absentee ballot through the prison mail. After it arrives, he makes lists of the respective candidates' priorities and compares them with his own. "As a voter, my job is to assess the best candidate for my values, my family's values, and the values of the country," he told me, after I visited G-Pod last summer. "I want to have a say in my own future."

Bates is one of about a million and a half people who are currently serving prison terms in the United States. Only a tiny minority of those people are allowed to vote: in forty-eight states, voting from prison—which is legal in most of the European Union and in countries as disparate as Indonesia, South Africa, Canada, and Kenya—is either severely restricted or outlawed altogether. Alabama, Mississippi, and Alaska allow some people in prison to vote, depending on what crimes they have been convicted of. (Each state has a list of disqualifying crimes; a state representative in Mississippi has called his state's list, which includes check-forging but not child molestation, "irrational.") Only Maine and Vermont extend the franchise to all incarcerated citizens. In this sense, the northeastern corner of the U.S. is either a national outlier or a glimpse of what a different sort of democracy might look like.

I met Bates, who is fifty-two, on a warm afternoon in June, just outside the prison woodshop where he works for a fraction of the minimum wage. Bates, unlike most prisoners in Maine, is black, with a salt-and-pepper goatee. He is the president of

the Maine State Prison chapter of the N.A.A.C.P., which has registered thousands of incarcerated voters over the years. He described voting as a small but resilient bond that he shares with the society that has sent him away. "When a person is incarcerated, the thing that remains is that he's still a citizen," Bates said. "We have to have something to go home for."

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Bates is serving a life sentence for the rape and murder of a woman named Tammy Dickson, who was found strangled to death in South Portland, in 1994. He maintains his innocence, alleging racial bias from an all-white jury; he has appealed his conviction four times without success. (Maine outlawed parole in 1976.) Two women have come forward with testimony that could cast doubt on his conviction, but, in July, a judge said that a one-year deadline to present new evidence had passed.

Bates estimated that in 2008 the N.A.A.C.P. registered about three hundred voters in Maine State Prison, an unusually high number that he attributed to enthusiasm for Barack Obama. (The prison houses about nine hundred people.) But Republican candidates have a strong base of support within the prison, too, he said. He believes that it's difficult to generalize about the political views of the incarcerated, and he isn't convinced that political affiliations on the inside closely follow racial lines. Bates does not belong to a political party, but he hopes that a Democrat will "get the country back on track" after four years of President Trump. When we spoke, he was leaning toward Elizabeth Warren or Kamala Harris. Harris's background as a prosecutor seemed not to bother him. "I like her strategy, I like her values," he told me. He said he would consider voting for Joe Biden but worried that the former Vice-President wasn't electable enough.

"I want to have a say in my own future."

FOSTER BATES, A RESIDENT OF MAINE STATE PRISON

I had gone to see Bates after the voting rights of the incarcerated briefly and perhaps improbably became an issue in the 2020 Presidential race. In Iowa, last April, a volunteer for the A.C.L.U. had asked Bernie Sanders whether people in prison should be able to vote, and Sanders had said yes, unequivocally. He reiterated his position at a CNN town hall later that month. The Republican senator Lindsey Graham then seized on Sanders's comments as a political opportunity: "Let's vote on @BernieSanders idea to allow rapists, murderers, and terrorists to vote from prison," Graham wrote on Twitter. "See where every elected official stands!" The other Democratic candidates were subsequently asked for their views. Four candidates who have since dropped out—O'Rourke, Castro, Booker, and Yang—said that some people should be allowed to vote from prison; Warren and Harris said that we should have "a conversation" about people voting in prison; Pete Buttigieg argued that disenfranchisement is a necessary part of incarceration. (All the candidates supported restoring voting rights for those who have completed their sentences.)

In the common area of G-Pod—where prison officials allowed me to conduct interviews on the condition that I omit the names of the people I met—I spoke to a white voter with a buzz cut and goatee. He told me that he usually preferred the Democrats but sometimes agreed with Republicans, and that he watched Fox News along with CNN and a local station. He estimated that a quarter of his fellow-prisoners vote. "There's nothing holding you back," he said. "It's whether you want to." Another man, who had immigrated to the U.S. from Somalia, in 2011, shared his disappointment that he wasn't allowed to vote because he is not a U.S. citizen. "I wish I filled out my paperwork at the appropriate time, so I could

express how I feel," he said. Like Bates, he supported Kamala Harris. "I think we're ready for a female President," he said.

Just before I left the prison, a guard led me through an activity building, where I noticed a tall, bearded man sitting at a computer. When I asked about his views on voting from prison, he thought for a long moment and said, in a deep voice, "Yes. Prisoners should have the right to vote." He pointed out that he is incarcerated with many educated men, and said that they could make good choices. But he had made a personal decision not to vote, he told me. "I'm not big on choosing between the lesser of two evils," he said.

On an abstract level, the argument for restricting the voting rights of incarcerated citizens may seem straightforward. "If you're not willing to follow the law yourself, then you shouldn't have a right in making the law for everyone else," Roger Clegg, the president of the Center for Equal Opportunity, a conservative think tank in Virginia that also opposes bilingual education and affirmative action, told me recently. Incarceration prevents people from exercising many other basic rights, and while the Constitution outlaws disenfranchisement "on account of race, color, or previous condition of servitude," it levies no penalty against states that disenfranchise citizens "for participation in rebellion, or other crime." David Feldman, a law professor at Cambridge who has written about the voting rights of prisoners, told me that one could, of course, frame voting rights in terms of a social contract: citizens earn the franchise by following certain rules set by society and can lose the franchise if they commit specific crimes. This, however, is not the logic followed in the U.S., he noted: people are often disenfranchised according to the sentences they receive, rather than the crimes that they commit.

Feldman believes that only a few crimes, such as voter fraud or election tampering, ought to disqualify someone from voting. "A blanket ban is totally indiscriminate, and it's both over-inclusive and under-inclusive," he told me. "There are people in prison who really are not bad people, and happen to have been sentenced to prison

not for any particularly serious offenses, but perhaps for a build-up of a whole lot of fairly minor offenses." Other people who have committed crimes are never convicted or never face incarceration.

In recent years, activists on the left have built a movement for voting-rights restoration. It has largely focussed on the reënfranchisement of people who have already served their time. The legislatures of Kentucky, New Jersey, and Louisiana have restored voting rights for large numbers of formerly incarcerated people; Democratic governors, and occasionally Republican ones, have used their clemency powers to do the same. But these efforts seldom aim for universal suffrage. When advocates in Florida proposed a voting-rights-restoration amendment to the state constitution, in 2018, they excluded people on probation or parole and those who were convicted of murder or sexual offenses. After the amendment passed, with sixty-four per cent of the vote, Republican state legislators passed a bill to lessen its impact, requiring potential voters to pay court-imposed fines and fees before they could cast a ballot. Florida's Republican governor, Ron DeSantis, signed the bill into law, and, after the Florida Supreme Court affirmed that the law did not contravene the state constitution, he declared, on Twitter, "Voting is a privilege that should not be taken lightly." (Last week, the Eleventh Circuit Court of Appeals ruled that the law violated the Equal Protection Clause of the Fourteenth Amendment, upholding a federal judge's preliminary injunction.) Many people—including Hillary Clinton, who supports voting rights for former but not current prisoners—tweeted back at DeSantis to say that voting is not a privilege but a right. DeSantis later blamed his staff for the tweet.

Americans generally assume that they have a right to vote, but that right is not explicitly guaranteed by the Constitution. Voting isn't mentioned at all in the Bill of Rights; the Fourteenth and Fifteenth Amendments, which were adopted shortly after the Civil War, refer to a right to vote, and there are legal scholars who believe that this implicit granting of the right applies to all citizens. But the

Supreme Court has continued to defer to states when it comes to the regulation of elections—a legacy, in part, of the original drafting of the Constitution. In 2013, when the Supreme Court overturned a key provision in the Voting Rights Act of 1965, Chief Justice John Roberts, who wrote the decision, cited an earlier ruling, which held that "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." As Victoria Bassetti, a fellow at the Brennan Center for Justice, has observed, it was not "politically practicable," when the Constitution was written, "to impose uniform suffrage laws across the former colonies. Was the fragile new federal government really going to tell South Carolina that free blacks could vote? Or was it going to have to do the opposite and tell Massachusetts, which did allow blacks to vote, that it would have to stop? Easier to let state laws and provisions dealing with the vote stand."

Two centuries ago, only Connecticut barred citizens with criminal convictions from voting. The state's constitution, which was ratified in 1818, declared that a man's right to vote could be "forfeited by a conviction of bribery, forgery, perjury, duelling, fraudulent bankruptcy, theft, or other offence for which an infamous punishment is inflicted." In the years before the Civil War, seventeen states joined Connecticut in passing some form of felony disenfranchisement. Then, in the decade after the abolition of slavery, while the national movement for black suffrage was building momentum, ten more states, mostly in the South, quickly adopted them. The same period saw a sharp increase, in many states, in the incarceration of African-Americans. (Although the vast majority of people in prison cannot vote, the census counts them as living where they are incarcerated, shifting political representation to the places that have prisons.)

Many state lawmakers were explicit about the racist motivations for these changes. In 1901, Alabama Democrats, who had a history of election tampering, called a convention to rewrite the state constitution. "The justification for whatever manipulation of the ballot box that has occurred in this State has been the menace

of negro domination," John B. Knox, the president of the convention, said in his opening remarks. "If we should have white supremacy, we must establish it by law—not by force or fraud." The resulting constitution named twenty convictions, from robbery to forgery to vagrancy, that would strip men of their right to vote. The same document discriminated against black voters with poll taxes and literacy tests.

Felony-disenfranchisement laws spread across the country: by the nineteen-seventies, forty-six states had them. Massachusetts was the last state to join the group, passing a constitutional amendment in 2000 with more than sixty per cent of the vote. (The Prison Policy Initiative observed that it was "the first time that the Massachusetts constitution has been amended to take away rights from a group of people.") Three years later, three researchers published a paper in the *American Journal of Sociology* showing that the most stringent of these laws were to be found in states with many potential voters of color. In Tennessee, where citizens lose the franchise for life if they are convicted of crimes such as forgery, sodomy, or receiving stolen property, a fifth of African-Americans are barred from voting, according to the Sentencing Project. (The same was true in Virginia and Alabama until recently, when the Democratic governors of those states restored the franchise to large numbers of citizens.)

Vermont and Maine, the only states that have never disenfranchised prisoners, are also the whitest states in the nation. Less than four per cent of Vermonters, and less than five per cent of Mainers, are people of color. "I do think that it's not a coincidence that it's only Maine and Vermont that allow inmate voting," Emily Tredeau, a supervising attorney at the Vermont Prisoners' Rights Office, told me. "White voters will give pause before they disenfranchise other white people." Joseph Jackson, a formerly incarcerated activist, added, "Mainers look at Maine folks that are incarcerated as though they are not other." (While the prison population in Maine is mostly white, it is significantly less white than the state as

a whole: nearly twenty per cent of those incarcerated in Maine are people of color.)

Maine has not been entirely immune from peer pressure, though: between 1999 and 2013, legislators in Maine proposed bills to restrict voting from prison on six different occasions. L. Gary Knight, a Republican former member of the Maine House of Representatives, led the last of these efforts. He recalled that several people had been murdered in his area of Maine, and after speaking to the families of the victims, he was disturbed that those responsible were still allowed to vote. "I wondered why they could still be having some of the privileges of citizenship while they were incarcerated," he told me. "I put the bill in to bring us more into line with what the rest of the country was doing." He saw his proposal as a relatively moderate measure: it only would have affected people serving long sentences, most of whom have committed serious crimes, such as murder or rape. (The restrictions, under his proposed law, would have been lifted when people completed those sentences.) "It was deliberate that I did not try to involve all prisoners," Knight told me. People with criminal convictions should not be able to vote for judges who decide criminal cases, Knight thought. "When you break laws, there are consequences to those laws. Of course they should give up their rights."

> "White voters will give pause before they disenfranchise other white people."
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> EMILY TREDEAU, ATTORNEY AT THE VERMONT PRISONERS' RIGHTS OFFICE

Knight's bill was opposed by a broad coalition, including the A.C.L.U. of Maine, the Maine N.A.A.C.P., and the Maine Council of Churches. Laurent Gilbert, a former police chief and the mayor of Lewiston, denounced it, saying that

"maintaining the dignity of the human being is of utmost importance for a person to accept responsibility for his or her actions." Rachel Talbot Ross, a prison abolitionist who, as the president of the N.A.A.C.P. of Greater Portland, organized voter-registration drives in prison, said, "We cannot conscionably penalize entire communities by reducing their political power and their voice in the political decisions that affect them." Democrats in the legislature defeated the amendment by a wide margin. Three years later, Talbot Ross became the first African-American woman elected to the Maine House of Representatives. Maine and Florida, in a sense, have come at the issue of felony disenfranchisement from opposite sides. In Maine, a conservative minority has pushed back, with little success, against the assumption that voting rights are universal and unaffected by criminal convictions. In Florida, a progressive movement has pushed back, with some success, against the assumption that citizens forfeit their voting rights when they are convicted of a crime. The debates in these two states reflect competing ideas about what governments are for: Is it more important for the state to defend the rights of its citizens or to require them to live up to certain responsibilities? Clegg, the president of the conservative think tank, compared people in prison to other groups that are not allowed to vote, such as non-citizens, "people who are mentally incompetent," and children. "The common denominator is that we have certain objective minimum qualifications, in terms of responsibility and trustworthiness and commitment to our laws, that we require of people before they participate in the solemn enterprise of self-government," he said.

Clegg's argument takes for granted that the criminal-justice system is a fair barometer for who is trustworthy and responsible and who is not, which is a lot to ask of a system that incarcerates more people than any other in the world; that has criminalized addiction, mental illness, and poverty; and that sends black people to prison at five times the rate of white people. His argument also depends on the idea that a citizen must, in some sense, be qualified to vote—an idea that served as the basis of poll taxes and literacy tests which entrenched Jim Crow, and which

prevented black Americans from voting for a hundred years. If voting is a privilege, not a right, then who decides on what basis that privilege can be withdrawn? Recent voter-suppression efforts have withheld the franchise for as little as a typo in a voter-registration record or the lack of a photo I.D.

Before Florida passed its voting-rights-restoration amendment, there was a way for the disenfranchised to vote again: by asking the governor's Board of Executive Clemency to restore their rights on a case-by-case basis. Governor Jeb Bush, a Republican, used clemency to restore the franchise to about seventy-six thousand people; Governor Charlie Crist, who was elected as a Republican and later switched parties, restored it to about a hundred and fifty-five thousand people. But under Governor Rick Scott, also a Republican, the board adopted an opaque interview process that approved only a few thousand applications. According to an investigation by the Palm Beach *Post*, this system favored whites and Republicans; in 2018, a federal judge deemed it discriminatory and unconstitutional. "To vote again, disenfranchised citizens must kowtow before a panel of high-level government officials over which Florida's governor has absolute veto authority," the judge wrote. "No standards guide the panel." One argument for universal suffrage is that when a few citizens control the democratic rights of other citizens, the society itself becomes less democratic. The alternative to an imperfect system of voting-rights restoration is a universal system of voting-rights preservation.

In the weeks before the Iowa caucuses, as the 2020 primary season began in earnest, I got two letters from voters in prison. One came from T. J. Lang, a man from Vermont who was convicted of first-degree murder and sentenced to life without parole. His incarceration has been outsourced to a private prison in Mississippi, where he and other Vermonters are allowed to vote absentee. "I am sporadically following the primary process, and with my flipping channels between MSNBC, Fox News and CNN, I'm hopeful that anyone besides Trump will be elected … except Sanders and Boot Edge-Edge," he wrote. Lang follows

current events and often writes letters to local newspapers, but he sounded tired of national politics. "I'll just be happy when it's all finally over."

The other letter came from Foster Bates, in Maine, where the political scene seemed very different. "The political climate at Maine State Prison is absolutely enthusiastic and buzzing right now," he wrote. "Donald Trump has raised the political temperature at the White House, igniting the enthusiasm of the unlikeliest of voters." He went on, "The conversations around the facility are centered on the impeachment hearing. Most Republicans at Maine State Prison feel the impeachment of Donald Trump is a witch hunt, and a farce, and that the Dems are sore losers because they did not win the White House with a bad presidential candidate in Hillary Clinton." Democrats at the prison seemed to support impeachment, he added, though "some Dems simply say 'take it to the voter's box' and let the voters beat Donald." Bates explained that he had not decided on his preferred candidate in the Democratic primary now that Kamala Harris was no longer running. "I like Elizabeth Warren and Bernie Sanders, however, Uncle Joe is right there," he wrote. He added, "Bernie is the only candidate talking about Criminal Justice Reform, and that is important for our Country's incarcerated people." He ended the letter with a message for voters who, like him, want to see change in the White House. "Go vote and let your voices be heard," he wrote. And, below that, again, "GO VOTE!!!" Thursday is the deadline for his peers in Maine State Prison to request an absentee ballot for the Maine primary, on Super Tuesday. State election rules list four "special circumstances" that allow a voter to request a ballot after that date; being in prison is not among them.

Daniel A. Gross is a story editor at The New Yorker.

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